THE HIGH COURT OF MEGHALAYA

CR (P) NO.(SH) 9/2013

Md. Sabir,
S/o (L) Karima Bibi,
R/o 3 JB, Shillong Cantonment,
Shillong. **:::::** Petitioner

- ***Vrs*** -

Md. Abdul Washid,
S/o (L) Karima Bibi,
R/o 3 JB, Shillong Cantonment,
Shillong. **:::::** Respondent

BEFORE
THE HON'BLE MR. JUSTICE T NANDAKUMAR SINGH

For the petitioner	:	Mr. S. Sen, Adv.
For the respondent	:	Mr. S.S. Das, Adv
Date of hearing	:	***10.04.2013***
Date of Judgment	:	***26.04.2013***

JUDGEMENT AND ORDER

1. By this petition under Article 227 of the Constitution of India, the petitioner is assailing the judgment and order of the District Judge, Shillong dated 21.12.2012 passed in FAO No.4(H)2011 for upholding the judgment and order dated 21.04.2011 passed by the Assistant District Judge, Shillong in Misc. Case No.39(H)2009 (reference Partition Suit No.12(H)2006) for temporary injunction restraining the petitioner from appropriating with the respondent/plaintiff's one fifth share of the monthly rent collected from the 26 tenants in the suit property and further directed the petitioner to deposit the same in the Court till the partition suit, where there is no main prayer for injunction, is finally decided. The core issues posed for consideration in the present revision are:-

(i) Whether the prayer for temporary injunction (mandatory temporary injunction) can be granted in a suit for partition simpliciter, where there is no main prayer for injunction (one of the main relief)? and

(ii) Whether the Court can exercise the discretionary powers to grant temporary (mandatory) injunction without considering the three Golden Tests, viz**:-**

(a) Whether the plaintiff has a prima facie case;

(b) Whether the balance of convenience is in favour of the plaintiff;

(c) Whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed? And

(iii) Whether temporary injunction could be granted at the discretion of the Court in a case which falls under Section 41 of the Specific Act, 1963?

2. Heard Mr. S. Sen, learned counsel appearing for the petitioner and Mr. S.S. Das, learned counsel appearing for the respondent.

3. Since this judgment is not required to give finding as to the claims made by the parties in their respective pleadings as that would be decided in the suit itself, this Court would not observe anything in this revision that may cause prejudice in disposal of the suit. As such, only the facts sufficient for deciding this revision are briefly noted.

4. The respondent/plaintiff filed the suit for partition simpliciter i.e. partition suit No.12(H)2006 in the Court of the Assistant District Judge at Shillong against the petitioner and others for the partition of the suit properties i.e. a plot of land including houses and other moveable properties etc. measuring 12,939 sq.ft. more or less situated at Jhalupara at Holding No.3 of Jhalupara Bazar within Cantonment Areas of Shillong with heritable and transferable lease hold right under leasehold patta dated 10.12.1965 granted by the Cantonment Board, Shillong and bounded as follows:-

North	:	Plot No.2.
South	:	Plot No.4.

East : Cantonment land.
West : Trenching ground road.

5. The relief sought for in the partition suit i.e. partition suit No.12(H)2006 are:-

"(a) A preliminary decree for partition of the properties in the suit according to the share of the parties;
(b) The appointment of a Commissioner for effecting the partition in terms of the preliminary decree;
(c) A final decree of partition embodying the Commissioner's Report;
(d) The cost of the Suit;
(e) Any other relief/reliefs the plaintiff is entitled to".

6. In the plaint of the partition suit No.12(H)2006, the respondent/plaintiff pleaded that the plaintiff's share comes to 1/5th of the property (suit property) and the disputes and differences have arisen between the plaintiff and the defendants regarding the enjoyment and management of the suit property and it has become impossible for the plaintiff to possess the properties jointly with the defendants. In the plaint, nothing is mentioned about the tenants of the suit property and collection of the rent from the tenants.

7. No relief for injunction is sought for in the plaint. In other words, there is no prayer for injunction and also no pleadings regarding the tenants of the suit land. What are pleaded in the plaint, in gist, are that the plaintiff and defendants are possessing the suit properties (vide para-1 of the plaint) and the disputes and differences had arisen between the plaintiff and the defendants regarding the enjoyment and management of the suit properties and it has become impossible for the plaintiff to possess the suit properties jointly with the defendants.

8. It is an admitted case of both the parties that while the partition suit i.e. partition suit No.12(H)2006 was pending before the trail court, the

respondent/plaintiff filed an application for temporary injunction restraining the tenants in the suit premises from paying monthly rent of the suit premises to the petitioner/defendant and deposit the same before the Court till the partition suit is finally decreed. The said application for temporary injunction was registered as Misc. case No.23(H)2006. The learned trial court i.e. the Assistant District Judge, Shillong after hearing the parties, rejected the said application for temporary injunction i.e. Misc. case No.23(H)2006 vide order dated 15.09.2009.

9. After the said application for temporary injunction i.e. Misc. Case No.23(H)2006 was rejected, the respondent/plaintiff filed another application for granting temporary injunction (mandatory) directing the petitioner to deposit 1/5th of the rent collected from the tenants from the suit land in the Court till the partition suit is finally decided. The said second application for temporary injunction was registered as Misc. case No.39(H)2009. The prayer portion of the said application for temporary injunction i.e. Misc. Case No.23(H)2009, reads as follows:-

> *"In the premises aforesaid the petitioner/plaintiff prays that the Hon'ble Court may be pleased to issue an ad-interim order restraining the opposite party No.1/defendant from appropriating the 1/5th share of the plaintiff in respect of rent collected from the tenants and deposit the same to the Court till the partition suit is finally decided and make the order absolute after hearing the parities.*
>
> *And for this act of kindness, the petitioner shall ever pray".*

10. The learned Court i.e. the Assistant District Judge, Shillong passed an order dated 21.04.2011 in Misc. Case No.39(H)2009 against the petitioner/defendant restraining him from appropriating the respondent/plaintiff's 1/5th share of the monthly rent collected from the 26 tenants in the suit property and directed to deposit the same to the Court till the partition suit is finally decided. The learned trial court while passing the order dated 21.04.2011 (temporary injunction) had considered the case of

the respondent/plaintiff which are not at all pleaded in the plaint and granted the relief as an temporary measure i.e. temporary injunction in the suit for partition simpliciter i.e. partition suit No.12(H)2006, where there is no main prayer for mandatory injunction/permanent injunction. It is fairly well settled that the interim order is passed in aid of the final order and an ad-interim order for temporary injunction cannot be passed in a suit, where there is no main prayer for injunction or in other words, the temporary relief or interim order cannot be passed independent of the prayer sought for in the main suit. This is the main ground in the present revision petition for assailing the impugned order for granting temporary injunction.

11. The petitioner filed an appeal being FAO No.4(H)2011 against the said judgment and order dated 21.04.2011 passed by the learned Assistant District Judge, Shillong for granting temporary injunction in the Court of the District Judge, Shillong. The learned District Judge, Shillong passed the cryptic order dated 21.12.2012, dismissing the appeal. The learned District Judge, Shillong in her order dated 21.12.2012 did not even made a whisper regarding the three golden tests for passing the temporary injunction and also did not mention any reason for upholding the order for granting temporary injunction in a suit for partition simpliciter, wherein there is no main prayer for injunction/mandatory injunction. The findings of the learned District Judge in her cryptic order dated 21.12.2012, read as follows:-

> *"**6.** Shri.S.Sen, Ld/Counsel for the Appellant has advanced his submissions that the Trial Court has passed the Impugned Order without applying its judicial mind to the position of law and materials available on record, and has failed to appreciate that the Respondent has not challenged the Order dated 15.09.2009 in Misc. Case No.23(H)2006 rejecting the first application for injunction; and that the Trial Court most illegally held in the Impugned Order that the Respondent had a one-fifth share of the total rent being drawn from the tenant in the suit premises, when his claim has been challenged and the Impugned Order being illegal and completely misconceived ought to be set aside.*
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> ***7.** In contra Shri.S.S. Das, Ld/Advocate for the Respondent submits that the Impugned Order of the Trial Court does not*

suffer from any illegality or infirmity, but has been passed on due application of judicial mind. That the parties are governed by Mohammedan law which prescribes that all the sons and daughters have a share in the property of their parents, and the Respondent has filed the application only for restraining the Op/Appellant from appropriating his one-fifth share of the rent which was allowed by the trial Court, and that the Impugned Order does not warrant any interference and Appeal ought to be dismissed.

8. *The Judgment in this case was delayed as I was pre-occupied with other judgments in Sessions cases, MAC involving old cases, and was also on long leave.*

9*. As observed earlier the parties litigating are sons and daughters of (L) Karima Bibi and for that purpose T.S. No.4(H)2006 is pending disposal in the Court of the Assistant District Judge. So, it will be inappropriate to make any comments over the right and title of the parties to the said suit at this stage. Obviously, the suit will be decided on its own merit.*

10. *The challenge of Resjudicator (Sic) was also taken up in this case submitting that Vide Order dated 15.09.2009 in Misc. Case No.23(H)2006, the Respondent is barred in filing the said Misc. Application No.39(H)2009 Impugned herein. Suffice to say that the earlier Misc. Case No.23(H)2006, the respondent had filed a Petition for direction to the tenants to deposit the rent in the Court, and the same was rejected by the Court Vide Order dated 15.09.2009 holding that the tenants cannot be directed to deposit the rent in the Court as the Ops were depending for their survival on the rent, income wherein, the instant Misc. Case No.39(H)2009 the prayer is for depositing the one-fifth share of the Respondent with regard to the rent collected to be deposited in Court and not to be appropriated by the Appellant. As such, the prayer herein is different from the earlier case.*

11. *In the instant case, the Ld/Assistant District Judge has elaborately discussed the issue involved and has come to the conclusion that the one-fifth share of the rent be deposited in the Court pending disposal of the Title Suit between the parties.*

12. *The Impugned Order has been rendered after due consideration and satisfaction of the Ld/Assistant District Judge and there seems to be no illegality committed by the Trial in making the order absolute till the disposal of the Title Suit pending between the parties.*

13. *I find no reasons to interfere with the order dated 21.04.2011 passed by the Ld/Assistant District Judge in Misc. Case No.39(H)2009".*

12. While the FAO No.4(H)2011 was pending in the Court of the District Judge, Shillong, the respondent/plaintiff and others including grandsons and daughter of (L) Karima Bibi filed a suit i.e. TS No. 19(H)2011

for declaration of the title in respect of the leasehold property i.e. the suit property of the partition suit i.e. partition suit No.12(H)2006 and also for mandatory injunction against the present petitioner and the Executive Officer, Cantonment Board, Shillong. The suit property (suit land) of the T.S. No.19(H)2011 and that of the partition suit No.12(H)2006 are the same. The prayer sought for in T.S.No.19(H)2011 are as follows:-

> *"**(i)** A declaration that the deed of relinquishment (annexure-II) is a fake and fraudulent one.*
> ***(ii)** The Declaration that the WILL (Annexure-III) is a fake one and void due to suspicious circumstances.*
> ***(iii)** That the declaration that all the legal heirs of late Karima Bibi are entitled to equal share of the rent collected from the tenants by the Defendant.*
> ***(iv)** Mandatory injunction restraining the Defendant from appropriating rent collecting from the tenants without payment of the shares of the other legal heirs.*
> ***(v)** Costs of the suits*
> *and any other relief or reliefs the plaintiffs are entitled to".*

13. Since one of the main relief sought for in T.S. Case No.19(H)2011 is injunction, the respondent could have prayed for temporary injunction inasmuch as the temporary injunction/interim order is in aid of the main relief. However, if the order for temporary injunction is required to be passed is to be decided by the concerned court. Therefore, this Court is not making any observations, if the respondent makes out sufficient materials for passing the injunction order in the present revision petition. But this Court, simply made an observations that the respondent/plaintiff is not technically barred from filing an application for temporary injunction in that suit i.e. T.S. No.19(H)2011.

14. This Court, before entering into the merit of the present revision petition under Article 227 of the Constitution of India, is discussing the point raised by the learned counsel appearing for the respondent that the revision

petition under Section 115 of the Code of Civil Procedure (in short "CPC") (as amended upto date) against the temporary injunction order is not maintainable. By the amendment Act 46 of 1999, the Clause (b) of the proviso to Sub-Section (1) of Section 115 has been omitted. After amendment, the proviso to Sub-Section (1) of Section 115 of the CPC reads as follows:-

> *"Provided that the High Court shall not, under this Section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings".*

15. Now the question is whether the order for injunction had finally decided an issue which would have finally disposed of the suit. Had the order for injunction been finally decided an issue it would have the effect of disposing of the suit, the revision petition under Section 115 of the CPC would have been maintainable. Section 115 of the CPC (for revision) is essentially a source of power for the High Court to supervise the sub-ordinate court. It does not in any way confer a right on a litigant aggrieved by any order of the sub-ordinate court to approach the High Court for relief. The power of the High Court under Section 115 of the Code (CPC) are limited to certain particular categories of cases. The power under Section 115 of the CPC is confined to jurisdiction and jurisdiction alone. The right of appeal is statutory. Right of appeal inhered in no one. When right is conferred by a statue it becomes a vested right. An appeal is a continuation of the proceedings; in effect the entire proceedings are before the appellate authority and it has the power to review the evidence subject to statutory limitations prescribed. In the case of revision, whatever powers the revisional authority may or may not have, it has no power to review the evidence, unless the statute expressly confers on it that power. The scope for making a

revision under Section 115 is not linked with a substantive right. The appeal cannot be equated with the revision.

16. The Apex Court in ***Shiv Shakti Coop. Housing Society, Nagpur v. Swaraj Developers and others*** reported in ***(2003) 6 SCC 659***, had considered and decided the points as to the maintainability of the revision petition under Section 115 of the CPC (after amendment by Act 46 of 1999 w.e.f. 01.07.2002) against the order of injunction and held that if the impugned order is interim in nature or does not finally decide the lis, the revision application will not be maintainable. The Apex Court further held that since the temporary injunction order does not finally decided the lis, the revision under Section 115 of the CPC (after amendment by Act 46 of 1999) will not be maintainable.

17. The Apex Court also considered the submissions of the learned counsel for the appellants that even if the revision applications are held to be not maintainable, there should not be a bar on challenge being made under Article 227 of the Constitution of India and made an observation that if the appellants avail such remedy, the same shall be dealt with in accordance with law. Therefore, the small window is left open as to the maintainability of the application under Article 227 of the Constitution of India against the order for temporary injunction. Paragraphs 4, 13, 14, 15, 16, 17, 28, 29, 30, 31, 32, 35 & 36 of the ***SCC Shiv Shakti Coop. Housing Society, Nagpur (****Supra****)*** read as follows:-

> *"**4.** It has been contended by learned counsel for the appellants that the High Court went wrong in disposing of the revision applications as not maintainable, on several grounds. They are (i) the amended provisions do not apply to petitions which were admitted before the amendment, (ii) appeals and revisions stand on a parallel footing and are vested rights in the appellant/applicant, as the case may be, and as such the amended provisions would not have any application, and (iii) the applications for injunction and the like which form subject matter of the revisions relate to the expression 'other proceeding' and even if the amended provisions apply disposal of the revision would have meant final dismissal of such "other proceeding".*

13. *First aspect that has to be considered is the respective scope of appeal and revision. It is fairly a well settled position in law that the right of appeal is a substantive right. But there is no such substantive right in making an application under Section 115. Though great emphasis was laid on certain observations in* ***Shankar Ramchandra Abhyankar v. Krishnaji Dattatraya Bapat ((1969) 2 SCC 74: AIR 1970 SC 1)*** *to contend that appeal and revision stand on the same pedestal, it is difficult to accept the proposition. The observations in the said case are being read out of context. What was held in that case related to the exercise of power of a higher court, and in that context the nature of consideration in appeal and revision was referred to. It was never held in that case that appeal is equated to a revision.*

14*. Section 115 is essentially a source of power for the High Court to supervise the subordinate courts. It does not in any way confer a right on a litigant aggrieved by any order of the subordinate court to approach the High Court for relief. The scope for making a revision under Section 115 is not linked with a substantive right.*

15. *Language of Sections 96 and 100 of the Code which deal with appeals can be compared with Section 115 of the Code. While in the former two provisions specifically provide for right of appeal, the same is not the position vis-à-vis section 115. It does not speak of an application being made by a person aggrieved by an order of subordinate court. As noted above, it is a source of power of the High Court to have effective control on the functioning of the subordinate courts by exercising supervisory power.*

16. *An appeal is essentially continuation of the original proceedings and the provisions applied at the time of institution of the suit are to be operative even in respect of the appeals. That is because there is a vested right in the litigant to avail the remedy of an appeal. As was observed in* ***K. Eapen Chako v. The Provident Investment Company (P) Ltd. ((1977) 1 SCC 593: AIR 1976 SC 2610****) only in cases where vested rights are involved, a legislation has to be interpreted to mean as one affecting such right to be prospectively operative. The right of appeal is only by statute. It is necessary part of the procedure in an action, but "the right of entering a superior court and invoking its aid and interposition to redress the error of the courts below. It seems to this paramount right, part of the progress of the inferior tribunal." (****Per Lord Westbury See: Attorney General vs. Sillem (33 LJ Ex.209: 10 LT 434: 10HLC 704, 724: 11 ER 1200****). The appeal, strictly so called, is one in which the question is, whether the order of the Court from which the appeal is brought was right on the materials which that Court had before it" (****Per Lord Devuil Ponnamal vs. Arumogam 1905 AC 383, 390****). The right of appeal, where it exists, as a matter of substance and not of procedure (Colonial Sugar Refining (****Colonial Sugar Refining Co. vs. Irtin 1905 AC 369: (1904-07) All ER Rep.Ext 1620 LT 738 (PC****).*

17. *Right of appeal is statutory. Right of appeal inherits in no one. When conferred by statute it becomes a vested right. In this regard there is essential distinction between right of appeal and right of suit. Where there is inherent right in every person to file a suit and for its maintainability it requires no authority of law, appeal requires so. As was observed in the* ***State of Kerala vs. K.M. Charia Abdulla and Co. (AIR 1965 SC 1585)****, the distinction between right of appeal and revision is based on differences implicit in the two expressions. An appeal is continuation of the proceedings; in effect the entire proceedings are before the appellate authority and it has power to review the evidence subject to statutory limitations prescribed. But in the case of revision, whatever powers the revisional authority may or may not have, it has no power to review the evidence, unless the statute expressly confers on it that power. It was noted by the four-Judges Bench in* ***Hari Shankar and others vs. Rao Girdhari Lal Chowdhury (AIR 1963 SC 698)*** *that the distinction between an appeal and a revision is a real one. A right of appeal carries with it a right of re-hearing on law as well as fact, unless the statute conferring the right of appeal limits the re-hearing in some way, as has been done in second appeals arising under the Code. The power of hearing revision is generally given to a superior Court so that it may satisfy itself that a particular case has been decided according to law. Reference was made to Section 115 of the Code to hold that the High Court's powers under the said provision are limited to certain particular categories of cases. The right there is confined to jurisdiction and jurisdiction alone.*

28. *Appeal is the right of entering a superior Court and invoking its aid and interposition to redress the error of the court below. (****per Lord Westbury C., Attorney General v. Sillem****, (****33 LJ Ex.209: 10 LT 434: 10HLC 704, 724: 11 ER 1200****).*

29. *"Appeal", is defined in the Oxford Dictionary, volume I, p.398, as the transference of a case from an inferior to a higher Court or tribunal in the hope of reversing or modifying the decision of the former. In the Law Dictionary by Sweet, the term "appeal" is defined as a proceeding taken to rectify an erroneous decision of a Court by submitting the question to a higher Court or Court of appeal, and it is added that the term, therefore, includes, in addition to the proceedings specifically so called, the cases stated for the opinion of the Queen's Bench Division and the Court of Crown Cases reserved, and proceedings in error. In the Law Dictionary by Bouvier an appeal is defined as the removal of a case from a Court of inferior to one of superior jurisdiction for the purpose of obtaining a review and re-trial, and it is explained that in its technical sense it differs from a writ of error in this, that it subjects both the law and the facts to a review and re- trial, while the latter is a Common Law process which involves matter of law only for re-examination; it is added, however, that the term "appeal" is used in a comprehensive sense so as to include both what is described technically as an appeal and also the common law writ of error. As Mr. Justice Subramania Ayyar observes in* ***Chappan v. Moidin Kutti, ILR (1899) 22 Mad 68:8 MLJ 231 (FB), ILR at p.80****, the two things which are*

required to constitute appellate jurisdiction are the existence of the relation of superior and inferior Court and the power, on the part of the former, to review decisions of the latter.

30. *Sub-section (2) of Section 115 has remained unaltered even after the amendment by the Amendment Act. A new sub-section (3) has been added in Section 115 by the Amendment Act which states that revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.*

31. *In Section 2, the expressions 'decree' and 'order' have been defined in clauses (2) and (14) respectively. It is to be noted that it matters little that the judgment is styled as an "order". If, in fact, it fulfils the conditions of the definition under Section 2(2), it is a decree and becomes appealable. Orders that are not appealable are, generally speaking, those which are procussual i.e. interlocutory or incidental orders regulating proceedings but not deciding any of the matters of controversy in the suit. Order 43 deals with the "appeals from orders". These appeals lie under Section 104 of the Code. The said Section deals with appeals from orders and specifies the orders from which appeals can lie. Sub-section (2) of Section 104 says that no appeal shall lie from any order passed in appeal under the said Section. Section 104 and Order 43 Rule I contain a full list of appealable orders. An order which amounts to a decree within Section 2(2) does not fall within Section 104 and the only applicable section is Section 96. Clauses (a) to (f) of Section 104 were omitted by Arbitration Act 1940. Section 105 relates to other orders. It, inter alia, relates to any order i.e. so appealable as well as non-appelable orders. It is in the nature of a prohibition stipulating that save as otherwise expressly provided, no appeal shall lie from any order made by a Court in exercise of original or appellate jurisdiction; but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal. Sub-section (2) deals with case of remand. This section, in fact, contemplates two things i.e. (1) regular appeal from decree; and (2) the provision relating to grant of objection relating to interim order. Order 43 Rule 1 is an integral part of Section 104.*

32*. A plain reading of Section 115 as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is 'yes' then the revision is maintainable. But on the contrary, if the answer is 'no' then the revision is not maintainable. Therefore, if the impugned order is of interim in nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject matter of revision under Section 115. There is marked distinction in language of Section 97(3) of the Old Amendment Act and Section 32(2)(i) of the Amendment Act. While in the former, there was clear legislative intent to save applications admitted or pending before the amendment came into force. Such an intent is significantly absent in Section 32(2)(i). The*

amendment relates to procedures. No person has a vested right in a course of procedure. He has only the right of proceeding in the manner prescribed. If by a statutory change the mode of procedure is altered the parties are to proceed according to the altered mode, without exception, unless there is a different stipulation.

35. *It was submitted by learned counsel for the appellants that even if the revision applications are held to be not maintainable, there should not be a bar on challenge being made under Section 227 of the Constitution. It was submitted that an opportunity may be granted to the appellants to avail the remedy.*

36. *If any remedy is available to a party under any statute no liberty is necessary to be granted for availing the same. If the appellants avail such remedy, the same shall be dealt with in accordance with law".*

18. The Apex Court again discussed the revisional power of the High Court under Section 115 of the CPC (after amendment by the Act 46 of 1999) and the supervisory jurisdiction of the High Court under Article 227 of the Constitution of India in ***Surya Devi Rai v. Ram Chander Rai and others*** reported in ***(2003) 6 SCC 675***. The Apex Court in ***Surya Devi Rai*** *(Supra)*, held that the power of the High Court under Articles 226 and 227 of the Constitution of India is always in addition to the revisional jurisdiction conferred on it. The curtailment of revisional jurisdiction of the High Court under Section 115 of the CPC (after amendment of the Act 46 of 1999) does not take away the power of the High Court under Articles 226 and 227. The power exists, untrammeled by the amendment in Section 115 of the CPC, and is available to be exercised subject to rules of self-discipline and practice which are well settled. Interlocutory orders, passed by the courts subordinate to the High Court against which remedy of revision has been excluded by the CPC Amendment Act 46 of 1999 are nevertheless open to challenge in and continue to be subject to certiorari and supervisory jurisdiction of the High Court under Articles 226 and 227 of the Constitution of India.

19. However, the Apex Court held that the High Court can invoke the jurisdiction under Article 227 of the Constitution of India only when a sub-

ordinate court has assumed a jurisdiction which it does not have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby. Paragraphs 24 and 38 of the ***SCC Surya Devi Rai (****Supra****)*** read as follows:-

> *"**24**. The difference between Articles 226 and 227 of the Constitution was well brought out **in Umaji Keshao Meshram. Vs. Smt. Radhikabai (1986 Supp. SCC 401)**. Proceedings under Article 226 are in exercise of the original jurisdiction of the High Court while proceedings under Article 227 of the Constitution are not original but only supervisory. Article 227 substantially reproduces the provisions of Section 107 of the Government of India Act, 1915 excepting that the power of superintendence has been extended by this Article to tribunals as well. Though the power is akin to that of an ordinary court of appeal, yet the power under Article 227 is intended to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and not for correcting mere errors. The power may be exercised in cases occasioning grave injustice or failure of justice such as when (i) the court or tribunal has assumed a jurisdiction which it does not have, (ii) has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and (iii) the jurisdiction though available is being exercised in a manner which tantamount to overstepping the limits of jurisdiction.*
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> ***38.** Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:-*
>
> *(1) Amendment by Act No.46 of 1999 with effect from 01.07.2002 in Section 115 of Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.*
>
> *(2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by the CPC Amendment Act No. 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.*
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> *(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.*

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the act, order

or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case".

20. From the joint reading of the decisions of the Apex Court in ***Shiv Shakti Coop. Housing Society, Nagpur (****Supra)* and in ***Surya Devi Rai (****Supra)***, it is clear that the small window is left open as to the maintainability of the revision petition under Article 227 of the Constitution of India against the interim order, like the injunction order in ***Shiv Shakti Coop. Housing Society, Nagpur (****Supra)* and made a finding in ***Surya Devi Rai*** **(***Supra***)** in what cases or under what circumstances relating with the interim order or temporary injunction, the High Court could invoke the supervisory jurisdiction under Article 227 of the Constitution of India and also that the High Court could exercise its supervisory jurisdiction, if a sub-ordinate court exercise the jurisdiction in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby. Accordingly, this Court is required to see as to whether the court below had exercised the jurisdiction in a manner not permitted by law, if the answer is Yes, the present application under Article 227 of the Constitution of India is maintainable. For the following reasons, this Court is of the considered opinion that the court below had exercised the jurisdiction in the manner not permitted by law in passing the temporary injunction order.

21. Section 41 of the Specific Relief Act, 1963, provides that the circumstances and the cases where the injunction order cannot be granted. Section 41 of the Specific Relief Act, 1963 reads as follows:-

*"**41. Injunction when refused** - An injunction cannot be granted ----*

(a) *to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the*

injunction is sought, unless such restraint necessary to prevent a multiplicity of proceedings;

(b) *to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought;*

(c) *to restrain any person from applying to any legislative body;*

(d) *to restrain any person from instituting or prosecuting any proceeding in a criminal matter;*

(e) *to prevent the breach of a contract the performance of which would not be specifically enforced;*

(f) *to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;*

(g) *to prevent a continuing breach in which the plaintiff has acquiesced;*

(h) *when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;*

(i) *when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the court;*

(j) *when the plaintiff has no personal interest in the matter".*

22. As stated above, there is no pleading in the plaint of the partition suit No.12(H)2006 regarding the collection of rent from the tenants of the suit property and also the facts constituting the dispute as to the collection of the rent from the tenants leading to the requirement of filing the application for temporary injunction restraining the petitioner from appropriating 1/5th share of the respondent in respect of the rent collection from the tenants and deposit the same to the Court till the partition suit is finally decided. For the sake of repetition, it is also reiterated that there is no prayer for perpetual injunction or permanent injunction in the partition suit No.12(H)2006. It is a settled law, that the pleadings of the parties form the foundation of their case, it is not open to give up the case set out in the pleadings and also cannot reprobate a new pleading and further a party cannot be allowed at the time of trial to change his case or set up a case

inconsistent with what he alleged in his pleading except by way of amendment of the pleading under Order VI Rule 17 CPC.

23. It is also fairly settled that the Court could not grant a relief in the writ petition in absence of proper plea and any prayer to that effect.

(A) The Apex Court in ***Bondar Singh and Another vs. Nihal Singh and Others: (2003) 4 SCC 161*** observed that:-

> "7. **....** **....** **....** **....**
>
> *It is settled law that in the absence of a plea no amount of evidence led in relation thereto can be looked into. Therefore, in the absence of a clear plea regarding sub-tenancy (shikmi), the defendants cannot be allowed to build up a case of sub-tenancy (shikmi). Had the defendants taken such a plea it would have found place as an issue in the suit. We have perused the issues framed in the suit. There is no issue on the point.*
>
> *The pleadings of the parties form foundation of their case. It is not open to give up the case set out in the pleadings and also cannot reprobate a new pleading. The Apex Court in* ***Vinod Kumar vs. Surjit Kaur: (1987) 3 SCC 711*** *held that:*
>
> *"Further, the tenant averred in his written statement that the hall was let out for his residential use as well as for running a clinic but took a categoric stand during the enquiry that he had taken the hall on rent only for running his clinic and not for his residential needs as well. The pleadings of the parties form the foundation of their case and it is open to them to give up the case set out in the pleadings on profound a new and different case. Moreover, having taken up such a stand, the appellant again contended that the lease of the hall was of a compromise nature and as such the benefit of the enlarged definition of a non-residential building given in the E.P. Rent Restriction (Chandigarh Amendment) Act, 1982 would ensure to his aid in the case. The appellant cannot so reprobate."*
>
> *Importance and object of the pleadings had been discussed by the Apex Court in* ***Bechhaj Nahar v. Nilima Mandal & Ors: AIR 2009 SC 1103*** *held that:*
>
> *"The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the Court for its consideration."*

Provisions relating to pleadings in civil cases are meant to give to each side intimation of the cases of the other so that it may be met, to enable Courts to determine what is really at issue between the parties, and to prevent deviations from the course which the litigation on particular causes of action must take.

(B) The Apex Court in ***Ramsarup Gupta vs. Bishnu Narain Inter College (AIR 1987 SC 1262)*** at para 6, it has been laid down as quoted hereunder:-

> *"It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise."*

(C) *The Apex Court in* ***Krishna Priya Ganguly & Ors vs. University of Lucknow & Ors: (1984) 1 SCC 307*** held:-

> *"that a relief should be confined to those specially prayed for in the writ petition. In that case, i.e.* ***Krishna Priya Ganguly & Ors vs. University of Lucknow & Ors*** *(Supra) writ petitioner merely prayed for a writ directing the State and Medical College to consider his case for admission but without any proper relief the High Court issued a writ of mandamus directing the College to admit him (writ petitioner) to the Post of Graduate College. The Apex Court held that such direction to the college to admit him to the Post Graduate College would amount to granting a relief which the plaintiff never prayed for inasmuch as the prayer of the writ petitioner in the writ petition is only for a direction to consider his case for admission. The Apex Court in* ***State of Mysore vs. G.N. Lingappa & Ors: 1969 SLR 709 (SC)*** *held that the court cannot grant the relief in the writ petition in the absence of proper plea and any prayer to that effect. The Apex Court, further, in* ***Hindustan Petroleum Corpn Ltd. vs. Sunita Mehra & Ors: (2001) 9 SCC 344*** *held that the order not even challenged in the writ petitions cannot be quashed by the High Court in writ jurisdiction."*

24. The temporary injunction order is, no doubt, an interim relief or interim order. The Apex Court in ***State of Orissa v. Madan Gopal Rungta reported in AIR (39) 1952 SC 12***, held that an interim relief can be granted only in aid of and as an ancillary to the main relief which may be available to

the party on final determination of his rights in suit or proceeding. The relevant portion of para 6 in ***State of Orissa v. Madan Gopal Rungta*** ***(****Supra****)*** reads as follows:-

> *"6. …….. An interim relief can be granted only in aid of and ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding. If the Court was of opinion that there was no other convenient or adequate remedy open to the petitioners it might have proceeded to investigate the case on its merits and come to a decision as to whether the petitioners succeeded in establishing that there was an infringement of any of their legal rights which entitled them to a writ of mandamus or any other directions of a like nature; and pending such determination it might have made a suitable interim order for maintaining status quo ante. ……..".*

25. The Apex Court in ***Shipping Corporation of India Ltd. v. Machado Brothers and others*** reported in ***AIR 2004 SC 2093***, held that an interim order is in aid of final order and not vice-versa. Paragraphs 16 & 17 of ***AIR*** in ***Shipping Corporation of India Ltd. v. Machado Brothers and others (****Supra****)*** read as follows:-

> *"**16**. From the argument of the learned counsel for the respondent, we notice the same is based on the following grounds:*
>
> *(a) A revision against the dismissal of the application filed under section 151 before the High Court was not maintainable.*
>
> *(b) The application for dismissal lacked bona fides.*
>
> *(c) The respondent will be put to great hardship and prejudice if the said IA were to be allowed and its first suit is dismissed on the ground of having become infructuous because the protection of the interim order granted to it would be lost.*
>
> ***17.** Having carefully considered the arguments of the parties and perused the records, we notice that the first three arguments addressed by the appellant though seems to indicate some legal backing still will not be entertained by us because that was not the basis on which application I.A.20651/2001 was filed by the appellant before the trial court. The only ground on which the said application was filed is that, in view of the subsequent termination notice the first termination notice disappeared consequently the cause of action also disappeared. This application did not question the maintainability of the suit on the grounds which are urged now before us nor the various provisions of CPC now urged before us ever urged in the said application, and that does not also*

seem to be the argument of the appellant before the courts below as could be seen from the contents of the two impugned orders. We do not think we should permit the appellant to raise these grounds for which sufficient foundation has not been laid in the pleadings and arguments before the courts below. At the same time, we are unable to accept the argument of the learned counsel for the respondent who contended that the revision petition filed by the appellant before the High Court was not maintainable because of the availability of a remedy by way of an appeal. We have carefully examined the various provisions of the CPC which provides or contemplates filing of an appeal but we find no such provision available to the appellant to file an appeal against the order made by the trial court on an application filed under Section 151 CPC. Nor has the learned counsel appearing for the respondent been able to point out any such provision therefore, the said argument has to be rejected.

26. In ***Konjengbam Babudhom Singh v. Hemam Romonyaima Singh*** reported in ***AIR 1962 MANIPUR 18 (V 49 C 7)***, had discussed in threadbare, if the temporary injunction could be granted in a suit where there is no prayer for permanent injunction or perpetual injunction i.e. in a suit for declaration of title simpliciter without any prayer for consequential relief for injunction and held that temporary injunction cannot be granted in the absence of the prayer in the main suit for injunction. Para 8 of ***AIR*** in ***Konjengbam Babudhom Singh v. Hemam Romonyaima Singh (****Supra****)*** reads as follows:-

"8. Under those circumstances, it seems to me that Order 39, Rule 1 C.P.C. cannot be applied to the present case. It is true that under Order 39, Rule 1 C.P.C., when in a suit, it is proved that any property in dispute is in danger of being wasted, or damaged by any party to the suit, the Court may grant a temporary injunction to restrain such act. But in applying Order 39, Rule 1, the Court may grant a temporary injunction to restrain such act. But in applying Order 39, Rule 1, the Court has to see the reliefs claimed in the suit and see whether the injunction would be necessary in the face of the reliefs asked for. Thus in a case where a party claims declaration of title and permanent injunction in respect of a property, if he applies for a temporary injunction pending the suit, the Court will be entitled to see whether the opposite party should be restrained by a temporary injunction pending the suit. But in a suit claiming a mere relief of declaration of title on the basis that the party is in possession, the claim or the grant of a temporary injunction will be meaningless, because even granting that the party succeeds in the suit to get the relief of declaration, it will not

amount to a relief of permanent injunction which the party deliberately desisted in asking for. Thus, the temporary injunction would become useless even if he succeeds in the suit in getting a declaration, because even the declaration of title will not prevent the opposite party from claiming possession after the decree in the suit. Thus, the petitioner, if he wanted any relief in the suit regarding his possession, should have asked for consequential relief of a permanent injunction in addition to the declaration and paid the necessary court fee for it in which case he could certainly have claimed a temporary injunction. But if he omits to do so and restricts his claim to a mere declaration and when the opposite party disputes his case of possession, he cannot in this indirect manner be allowed to claim a relief of injunction thereby attempting to enlarge the relief claimed in the suit without paying the necessary court fee. In a suit for mere declaration of title, it cannot be said that there is a property in dispute within the meaning of Order 39, Rule 1 C.P.C."

27. In ***Kangabam Biramangol Singh v. Laimayum Ningol Aribam Ongbi Madhabi Devi*** and another reported in ***AIR 1962 Manipur 55 (V 49 C 18)***, it is of the similar view that in a suit for declaration of title simpliciter without any consequential relief for injunction, temporary injunction cannot be granted. Paragraphs 9, 11 and 12 of ***AIR Kangabam Biramangol Singh v. Laimayum Ningol Aribam Ongbi Madhabi Devi*** **(***Supra***)** read as follows:-

*"**9**. The question first arises whether there is any property in dispute in the suit. I have already stated that the suit relates to declaration of title to a land by the plaintiff on the allegation that he is already in possession. I have held in my decision Konjengbam Babudhom Singh v. Hemam Romonyaima Singh, Civil Revision Case No.10 of 1961; (AIR 1962 Manipur 18) that in a claiming a mere relief of declaration of title on the basis that the party is in possession, it cannot be said that there is a property in dispute within the meaning of Order 39 Rule 1 C.P.C. I have relied in that decision on a decision of the Nagpur High Court in Fakira Mahadaji v. Mt. Rumsukhibai: AIR 1946 Nag 428 in which it was held that in a suit for declaration simpliciter, there is really no property in dispute in the suit, but that only an incorporeal right in the property is litigated, that the fight is not about the property and that in such a suit, Order 39 Rule 1 C.P.C. will not entitle a party go get a temporary injunction in the suit. Thus, in a suit for mere declaration of title, neither the plaintiff nor the defendant will be entitled to apply for a temporary injunction to restrain the other party from interfering with his possession. This appears to have been pointed out in the counter statement filed by the petitioner. But neither the Munsiff nor the District Judge appears to have considered this question of law at all. Thus, this petition for*

temporary injunction should have been dismissed straightway as incompetent.

***11**. Even, if there is an injunction against alienation, such an order cannot be allowed to stand. Before granting any such injunction, the Court has to be satisfied that the applicant for injunction has got a prima facie case, that irreparable injury would be caused to the applicant if the injunction was not granted and further that the balance of convenience was in favour of granting the injunction. Both the Munsiff's order and the learned District Judge's order show that the only question considered was the prima facie case and the question of irreparable injury and balance of the convenience were not gone into at all. One fails to understand in what manner the alienation of the land by the plaintiff would affect the first respondent at all, in case she succeeded in the suit. A person to whom the petitioner alienates the land pending the suit cannot get any better rights than the petitioner himself and if the petitioner loses his case, then such alienation will not, in any way, affect the first respondent's rights. Hence, no injunction against the alienation can be granted by any Court to the first respondent.*

***12.** The only other ground on which a temporary injunction can be granted under Order 39 Rule 1, C.P.C. will be that the property in dispute is in danger being wasted or damaged. But the ground on which the injunction was granted to the first respondent was not that the property was in danger of being wasted or damaged, but that the first respondent had a prima facie case of title and was in possession of the land and that therefore the plaintiff should be restrained from interfering with the said possession. Such an injunction cannot be granted under Order 39 Rule 1. Interfering with the possession of the property is not the same as the property being wasted or damaged. There was no finding either by the Munsiff or the first appellate court that it was proved that the property was in danger of being wasted or damaged. Hence no injunction under Order 30 Rule 1 should have been granted to the first respondent at all in this case. I have already pointed out that even with regard to the interference with the first respondent's possession, there was no discussion by the Munsiff or the lower appellate court regarding the irreparable injury or balance of convenience. It is clear therefore that the injunction order cannot be supported."*

28. The Gauhati High Court again in ***Yumnam Yaima Singh and others v. Angom Jugin Singh and others*** reported in ***1997 (1) GLT 282***, also clearly held that in the absence of prayer in the main suit for perpetual injunction order, the party is not entitled to temporary injunction, no temporary injunction can be granted. The relevant portion of Para 5 of ***GLT*** in

Yumnam Yaima Singh and others v. Angom Jugin Singh and others ***(****Supra****)*** is quoted hereunder:-

> *"5. ……."if the plaintiff is likely to suffer irreparable or uncompensable damage, no interlocutory injunction will be granted, then, provided that the plaintiff would be able to compensate the defendant for any unwarranted restraint on the defendant's right pending trial, the balance would tilt in favour of restraining the defendant pending trial. Where both sides are exposed to irreparable injury pending trial, the courts have to strike a just balance". At page 447, it is stated that the court considering an application for an interlocutory injunction has four factors to consider: first, whether the plaintiff would suffer irreparable harm if the injunction is denied; secondly, whether this harm outweighs any irreparable harm that the defendant would suffer from an injunction; thirdly, the parties' relative prospects of success on the merits; fourthly, any public interest involved in the decision. The central objective of interlocutory injunctions should therefore be seen as reducing the risk that rights will be irreparably harmed during the inevitable delay of litigation".*
>
> *Injunctions by David Bean, 1st Edn., at page 22, it is stated - that "if the plaintiff obtains an interlocutory injunction, but subsequently the case goes to trial and he fails to obtain a perpetual order, the defendant will meanwhile have been restrained unjustly and will be entitled to damages for any loss he has sustained. The practice has therefore grown up, in almost every case where an interlocutory injunction is to be granted, of requiring the plaintiff to undertake to pay any damages subsequently found due to the defendant as compensation if the injunction cannot be justified at trial. The undertaking may be required of the plaintiff in appropriate cases in that behalf". In "Joyce on Injunctions Vol. 1 in paragraph 177 at page 293, it is stated: "Upon a final judgment dissolving an injunction, a right of action upon the injunction bond immediately follows, unless the judgment is superseded. A right to damages on dissolution of the injunction would arise at the determination of the suit at law."*
>
> *So what can be gathered from these passages quoted above is that where a party is not entitled to perpetual injunction, no temporary injunction can be granted, because the temporary injunction is only a step in aid to perpetual injunction. No injunction can be granted where perpetual injunction is prohibited by law or there it cannot be granted in the facts and circumstances, the question of granting temporary injunction does not arise. ……."*

29. The Apex Court in ***Mahadeo Savlaram Shelke and others vs. Pune Municipal Corporation and another*** reported in ***(1995) 3 SCC 33****,* held that:

10. *In Woodroffe's "Law Relating to Injunctions, Second revised and enlarged edition, 1992, at page 56 in para 30.01, it is stated that*

"an injunction will only be granted to prevent the breach of an obligation (that is a duty enforceable by, law)existing in favour of the applicant who must have a personal interest in the matter. In the first place, therefore, an interference by injunction is founded on the existence of a legal right, an applicant must be able to show a fair prima facie case in support of the title which he asserts".

At page 80 in para 33.02, it is further stated that

"if the court be of opinion that looking to these principles the case is not one for which an injunction is a fitting remedy, it has a discretion to grant damages in lieu of an injunction. The grounds upon which this discretion to grant damages in lieu 'of an injunction should be exercised, have been subject of discussion in several reported Indian cases".

At page 83, it is stated that "the court has jurisdiction to grant an injunction in those cases where pecuniary compensation would not afford adequate relief, The expression "adequate relief" is not defined, but it is probably used to mean - such a compensation as would, though not in specie, in effect place the plaintiffs in the same position in which they stood before. The determination of the question whether relief by injunction or by damages shall be granted depends upon the circumstances of each case.

11. *In "Law of Injunctions" by L.C. Goyle, at page 64, it is stated that "an application for temporary injunction is in the nature of a quia timet action. Plaintiff must, therefore, prove that there is an imminent danger of a substantial kind or that the apprehended injury, if it does come, will be irreparable. The word "imminent" is used in the sense that the circumstances are such that the remedy sought is not premature. The degree of probability of future injury is not an absolute standard: what is aimed at is justice between the parties, having regard to all the relevant circumstances".*

At page 116, it is also stated that

"in a suit for a perpetual or mandatory injunction, in addition to, or in substitution for, the plaintiff can claim damages. The court will award such damages if it thinks fit to do so. But no relief for dam- ages will be granted, if the plaintiff has not claimed such relief in the suit".

12. *In "Modem Law Review", Vol 44, 1981 Edition, at page 214, R.A. Buckley stated that "a plaintiff may still be de- prived of an injunction in such a case on general equitable principles under which factors such as the public interest may, in an appropriate case, be relevant. It is of interest to note, in this connection, that it has not always been regarded as altogether beyond doubt whether a plaintiff who does thus fail to substantiate a*

claim for equitable relief could be awarded damages". in "The Law Quarterly Review" Vol 109, at page 432 (at p.446), A.A.S.Zuckerman under Title "Mareva Injunctions and Security for Judgment in a Framework of Interlocutory Remedies" stated that

"if the plaintiff is likely to suffer irreparable or uncompensable damage, no interlocutory injunction will be granted, then, provided that the plaintiff would be able to compensate the defendant for any unwarranted restraint on the defendant's right pending trial, the balance would tilt in favour of restraining the defendant pending trial. Where both sides are exposed to irreparable injury pending trial, the courts have to strike a just balance".

At page 447, it is stated that

“the court considering an application for an interlocutory injunction has four factors to consider: first, whether the plaintiff would suffer irreparable harm if the injunction is denied; secondly, whether this harm outweighs any irreparable harm that the defendant would suffer from an injunction; thirdly, the parties' relative prospects of success on the merits; fourthly, any public interest involved in the decision. The central objective of interlocutory injunctions should therefore be seen as reducing the risk that rights will be irreparably harmed during the inevitable delay of litigation".

13. *In "Injunctions" by David Bean, 1st Edn., at page 22, it is stated that*

"if the plaintiff obtains an interlocutory injunction, but subsequently the case goes to trial and he fails to obtain a perpetual order, the defendant will meanwhile have been restrained unjustly and will be entitled to damages for any loss he has sustained. The practice has therefore grown up, in almost every case where an interlocutory injunction is to be granted, of requiring the plaintiff to undertake to pay any damages subsequently found due to the defendant as compensation if the injunction cannot be justified at trial. The undertaking may be required of the plaintiff in appropriate cases in that behalf".

In "Joyce on Injunctions Vol. 1 in paragraph 177 at page 293, it is stated

"Upon a final judgment dissolving an injunction, a right of action upon the injunction bond immediately follows, unless the judgment is superseded. A right to damages on dissolution of the injunction would arise at the determination of the suit at law".

14. *It would thus be clear that in a suit for perpetual injunction, the court would enquire on affidavit evidence and other material placed before the court to find strong prima facie case and balance of convenience in favour of granting injunction otherwise irreparable damage or damage would ensue to the*

plaintiff The Court should also find whether the plaintiff would adequately be compensated by damages if injunction is not granted. It is common experience that injunction normally is asked for and granted to prevent the public authorities or the respondents to proceed with execution of or implementing scheme of public utility or granted contracts for execution thereof Public interest is, therefore, one of the material and relevant considerations in either exercising or refusing to grant ad interim injunction. While exercising the power of discretion, the court should also adopt the procedure of calling upon the plaintiff to file a bond to the satisfaction of the court that in the event of his failing in the suit to obtain the relief asked for in the plaint, he would adequately compensate the defendant for the loss en- sued due to the order of injunction granted in favour of the plaintiff. Even otherwise the court while exercising its equity jurisdiction in granting injunction as also juris- diction and power to grant adequate compensation to mitigate the damages caused to the defendant by grant of injunction restraining to proceed with the execution of the work etc. which is retrained by an order of injunction made by the court. The pecuniary award of damages is consequential to the adjudication of the dispute and the result therein is incidental to the determination of the case by the court. The pecuniary jurisdiction of the court of first instance should not impede nor a bar to award damages beyond its pecuniary jurisdiction. In this behalf, the grant or re- fusal of damages is not founded upon the original cause of action but the consequences of the adjudication by the con- duct of the parties, the court gets inherent jurisdiction in doing ex debito justifiae mitigating the damage suffered by the defendant by the act of the court in granting injunction restraining the defendant from proceeding with the action complained of in the suit. It is common knowledge that injunction is invariable sought for in laying the suit in a court of lowest pecuniary jurisdiction even when the claims are much larger than the pecuniary jurisdiction of the court of first instance, may be, for diverse reasons, Therefore, the pecuniary jurisdiction is not and should not stand -an impediment for the court of first instance in determining damages as the part of the adjudication and pass a decree in that behalf without relegating the parties to a further suit for damages. This procedure would act as a check on abuse of the process of the court and adequately compensate the damages or injury suffered by the defendant by act of court at the behest of the plaintiff."

30. The Apex Court in ***Shiv Kumar Chadha v. Municipal Corporation of Delhi and others*** reported in ***(1993) SCC 161***, held that:

*"**30.** It need not be said that primary object of filing a suit challenging the validity of the order of demolition is to restrain such demolition with the intervention of the Court. In such a suit the plaintiff is more interested in getting an order of interim injunction. It has been pointed out repeatedly that a party is not entitled to an order of injunction as a matter of right or course., Grant of injunction is within the discretion of the Court and such*

discretion is to be exercised in favour of the plaintiff only if it is proved to the satisfaction of the Court that unless the defendant is restrained by an order of injunction, an irreparable loss or damage will be caused to the plaintiff during the pendency of the suit. The purpose of temporary injunction is, thus, to maintain the status quo. The Court grants such relief according to the legal principles ---- ex debite justitiae. Before any such order is passed the Court must be satisfied that a strong prima facie case has been made out by the plaintiff including on the question of maintainability of the suit and the balance of convenience is in his favour and refusal of injunction would cause irreparable injury to him.

31. *Under the changed circumstance with so many cases pending in Courts, once an interim order of injunction is passed, in many cases, such interim orders continue for months; if not for years. At final hearing while vacating such interim orders of injunction in many cases, it has been discovered that while protecting the plaintiffs from suffering the alleged injury, more serious injury has been caused to the defendants due to continuance of interim orders of injunction without final hearing. It is a matter of common knowledge that on many occasions even public interest also suffers in view of such interim orders of injunction, because persons in whose favour such orders are passed are interested in perpetuating the contraventions made by them by delaying the final disposal of such applications. The court should be always willing to extent its hand to protect a citizen who is being wronged or is being deprived of a property without any authority in law or without following the procedure which are fundamental and vital in nature. But at the same time the judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the Court.*

32. *Power to grant injunction is an extraordinary power vested in the Court to be exercised taking into consideration the facts and circumstances of a particular case. The Courts have to be more cautious when the said power is being exercised without notice or hearing the party who is to be affected by the order so passed. That is why Rule 3 of Order 39 of the Code requires that in ail cases the Court shall, before grant of an injunction, direct notice of the application to be given to the opposite party, except where it appears that object of granting injunction itself would be defeated by delay. By the Civil Procedure Code (Amendment) Act, 1976, a proviso has been added to the said rule saying that "where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay.....”*

31. The Apex Court in ***Mandali Ranganna and others v. T Ramachandra and others*** reported in ***(2008) 11 SCC 1***, held that while considering an application for grant of injunction, the Court will not only take into consideration the basic elements in relation thereto i.e. existence of a

prima facie case, balance of convenience and irreparable injury, it must also take into consideration the conduct of the parties. Grant of injunction is an equitable relief. A party, who had kept quite for a long time and allowed another to deal with the property exclusively, ordinarily would not be entitled to an order of injunction. The Court will not interfere only because the property is a very valuable one. Paragraphs 21, 22 and 23 of the ***SCC*** in ***Mandali Ranganna and others v. T Ramachandra and others*** *(Supra)*, read as follows:-

> "***21****. While considering an application for grant of injunction, the court will not only take into consideration the basic elements in relation thereto, viz., existence of a prima facie case, balance of convenience and irreparable injury, it must also take into consideration the conduct of the parties.*
>
> ***22.*** *Grant of injunction is an equitable relief. A person who had kept quiet for a long time and allowed another to deal with the properties exclusively, ordinarily would not be entitled to an order of injunction. The court will not interfere only because the property is a very valuable one. We are not however, oblivious of the fact that grant or refusal of injunction has serious consequence depending upon the nature thereof. The courts dealing with such matters must make all endeavours to protect the interest of the parties. For the said purpose, application of mind on the part of the courts is imperative. Contentions raised by the parties must be determined objectively.*
>
> ***23.*** *This Court in* ***M. Gurudas and Others v. Rasaranjan and Others [(2006) 8 SCC 367]*** *noticed:* ***(SCC p.374 para19)***
>
> *"19. A finding on 'prima facie case' would be a finding of fact. However, while arriving at such a finding of fact, the court not only must arrive at a conclusion that a case for trial has been made out but also other factors requisite for grant of injunction exist. There may be a debate as has been sought to be raised by Dr. Rajeev Dhavan that the decision of the House of Lords in* ***American Cyanamid Co. v. Ethicon Ltd. (1975 AC 396: (1975) 2 WLR 316: (1975) 1 All ER 504(HL)*** *would have no application in a case of this nature as was opined by this Court in* ***Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd (1999) 7 SCC 1) and S.M. Dyechem Ltd. v. Cadbury (India) Ltd. ((2000) 5 SCC 573*** *but we are not persuaded to delve thereinto."*
>
> *Therein, however, the question in regard to valid adoption of a daughter was in issue. This Court held that Nirmala was not a validly adopted daughter. This Court wondered* ***(M. Gurudas case (2006) 8 SCC 367, SCC p.379, para 34)***

> *"34. The properties may be valuable but would it be proper to issue an order of injunction restraining the appellants herein from dealing with the properties in any manner whatsoever is the core question. They have not been able to enjoy the fruits of the development agreements. The properties have not been sold for a long time. The commercial property has not been put to any use. The condition of the properties remaining wholly unused could deteriorate. These issues are relevant. The courts below did not pose these questions unto themselves and, thus, misdirected themselves in law."*

32. The Apex Court in ***Santosh Hazari v. Purushottam Tiwari (DECEASED) BY LRS*** reported in ***(2001) 3 SCC 179,*** held that:

> *"15. ……. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. ……..."*

33. As stated above, the learned 1st Appellate Court while passing the cryptic judgment and order dated 21.12.2012 in FAO No.4(H)2011 did not reflect its conscious application of mind, did not record any findings supported by reasons to show that she had considered the three golden tests for passing the temporary injunction order i.e.:

> **(i)** whether the party has a *prima facie* case;
>
> **(ii)** whether the balance of convenience is in favour of the plaintiff and
>
> **(iii)** whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed.

Over and above, both the trial courts as well as the first appellate court did not give any reasons or findings as to the requirement of passing the injunction order in favour of the respondent/plaintiff, who had kept quite for a long time and allowed another to deal with the suit property inasmuch as, the Court will not interfere only because the property is a valuable one. The Court also further reiterates that in the given case, the respondent/plaintiff cannot file an application for temporary injunction in a suit

for partition simpliciter, where there is no consequential prayer for permanent/perpetual/mandatory injunction inasmuch as temporary injunction order which is interim order in nature is only in aid of the main prayer. Therefore, both the courts below had exercised the jurisdiction in a manner not permitted by law in granting the prayer for temporary injunction in the Partition Suit where there is no consequential prayer for permanent injunction (mandatory injunction).

34. For the foregoing discussion, the judgment and order of the Assistant District Judge at Shillong dated 21.04.2011 passed in Misc. Case No.39(H)2005 (reference partition suit No.12(H)2006) and the judgment and order of the District Judge, Shillong dated 21.12.2012 passed in FAO No.4(H)2012 are hereby quashed.

35. The revision petition is allowed.

36. The learned Assistant District Judge at Shillong before whom the partition suit No.12(H)2006 is pending shall expeditiously dispose of the partition suit No.12(H)2006 not later than 4(four) months from the date of receipt of a certified copy of this judgment and order. In case, if for sufficient reasons, the partition suit No.12(H)2006 may not be possible to dispose of within the period indicated above, the learned Assistant District Judge at Shillong shall approach this Court for granting further time for completing the trial of the partition suit.

JUDGE

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